



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

5/4/82

Memorandum

To: Director, National Park Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Commercial Fishing in Glacier Bay National Park

FACTS: The major portion of what is now Glacier Bay National Park was incorporated into the National Park System through a 1925 proclamation by President Coolidge designating the area as a national monument. 34 Stat. 225 (1925). The boundaries established by that order were modified in 1939 when President Roosevelt enlarged the monument and included certain inland and marine water areas. 53 Stat. 2534 (1939). With the enactment of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (ANILCA), the monument was redesignated as a national park, further enlarged, and an adjacent national preserve was established. 16 U.S.C. 410hh-1. In addition, subsection 701(3) of ANILCA, 16 U.S.C. § 1132(3), classified most of the park's land area and some of its water zones as "wilderness." The water areas designated as wilderness are Adams Inlet, Hugh Miller Inlet, Charpentier Inlet, Rendu Inlet, Scidmore Bay, part of Dundas Bay, and the water area around the Beardslee Islands. This classification was made in accordance with subsection 3(c) of the Wilderness Act. 16 U.S.C. § 1132(c).

Commercial fishing has occurred in Glacier Bay for many years. For the most part, this activity is concentrated in Glacier Bay and its major inlets and along the coast in the Gulf of Alaska and the Cross Sound. Commercial fishing has also occurred, to some extent, in some of the waters designated as wilderness by subsection 701(3) of ANILCA. The National Park Service (NPS) is developing proposed regulations which would prohibit motorized use in some of those areas. Dundas Bay and a portion of the Beardslee Islands waterway will be left open to motorboat use. These closures will not prohibit the use of the wilderness water zones for emergency purposes.

ISSUE: Are commercial enterprises permissible in Glacier Bay wilderness areas?

CONCLUSION: Section 707 of ANILCA mandates that wilderness areas in Alaska be managed in accordance with the provisions of the Wilderness Act. Subsection 4(c) of the Wilderness Act prohibits commercial enterprises in wilderness areas. Under subsection 701(3) of ANILCA, certain Glacier Bay water areas are designated as wilderness. This classification was imposed to preserve those areas for recreational uses. Although the Wilderness Act vests the Secretary with authority to allow otherwise prohibited aircraft and motorboat activities to occur in designated areas if it is demonstrated that they are "established uses," there is no such exemption for commercial enterprises. Accordingly, the identified Glacier Bay water areas must remain closed to commercial fishing, which we conclude is a commercial enterprise. This closure applies to commercial fishing in a very small portion of the Glacier Bay water zone. Closure is not required by this opinion for those commercial enterprises which are relied upon to realize the recreational and other wilderness purposes of designated areas (e.g., in Alaska, such activities could include expedition support, hunting and fishing guides, trapping, backcountry outfitters and guides, tourboats). See 16 U.S.C. § 1133(d)(6).

The conclusion that commercial fishing is prohibited in Glacier Bay wilderness zones is consistent with subsection 1110(a) of ANILCA, 16 U.S.C. § 3170(a), which provides that certain modes of transportation may be used in conservation system units for traditional activities permitted by law. Because commercial fishing is an activity which is not "permitted" by the Wilderness Act, it cannot occur under subsection 1110(a). When subsection 1110(a) modes of access are used to perform traditional activities permitted by law, such as recreation, they may be prohibited only after notice and hearing and a determination that they are detrimental to the resource values of the unit.

DISCUSSION

A. Requirements of the Wilderness Act.

The Wilderness Act, 16 U.S.C. § 1131 et seq., was enacted in 1964, "[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition...." 16

U.S.C. § 1131(a). To effectuate this policy, Congress established the National Wilderness Preservation System composed of Congressionally designated federal areas "where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c). Wilderness areas will also "generally [appear] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable," present "outstanding opportunities for solitude or a primitive and unconfined type of recreation," have sufficient acreage, and contain, as appropriate, "ecological, geological, or other features of scientific, educational, scenic, or historical value." Id.

In order to preserve these values, Congress directed agencies responsible for administering wilderness areas to manage them for the "public purposes of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C. § 1133(b). In subsection 4(c), certain activities, judged to be inconsistent with these wilderness uses, are expressly prohibited:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area. 16 U.S.C. § 1133(c) (emphasis added).

In recognition of the administrative and public use difficulties which could result from a blanket application of the subsection 4(c) prohibitions, the drafters of the Act created a limited exemption for certain "established uses:"

Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary [↑] . . . deems desirable. 16 U.S.C. § 1133(d)(1) (emphasis added).

This exemption was also extended to measures necessary for the control of fire, insects, and diseases. Id. Under this subsection, the Secretary has discretion to allow these activities to occur. Should it be determined that "established" motorboat or aircraft activity is undesirable in a designated area because, for example, it would be detrimental to wilderness values, the Secretary need not invoke the "established use" exemption. Thus, under the Wilderness Act, a designated area can remain closed to all motorized use, unless paragraph 4(d)(1) is invoked, supported by appropriate administrative findings.

It is important to note that, unlike the use of motorboats and aircraft, established "commercial enterprises" were not exempted from the subsection 4(c) prohibition. This distinction is significant in that it indicates that a "commercial enterprise" which involves the use of a motorboat or aircraft cannot be allowed even if it is argued that the motorboat or aircraft is an "established use." The only exemption for commercial enterprises is found in paragraph 4(d)(6):

Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the area. 16 U.S.C. § 1133(d)(6) (emphasis added).

As is true of the paragraph 4(d)(1) "established use" exemption, the Secretary has discretion to allow these services to be performed.

B. Requirements of ANILCA.

The Glacier Bay Wilderness, consisting of approximately two million seven hundred and seventy thousand acres, was designated by subsection 701(3) of ANILCA. 16 U.S.C. § 1132(3). Although subsection 701(3) does not delineate boundaries for the wilderness area, it incorporates the official boundary maps described in section 103. 16 U.S.C. § 3103. Reference to maps GLBA-90,004 (October, 1978) indicates that the following water areas were included in the

wilderness portions of the park: Rendu Inlet, Scidmore Bay, Hugh Miller Inlet, Charpentier Inlet, Adams Inlet, part of Dundas Bay, and water areas in the vicinity of the Beardslee Islands. 1/

As Senate Report No. 413 states, this small segment of the Glacier Bay water zone was set aside as wilderness to preserve its suitability for non-motorized recreational water activities:

Glacier Bay Wilderness consists of about 2,770,000 acres of lands and waters within the expanded Glacier Bay National Park. Almost all of the park, including some salt water areas and all islands will be managed as wilderness. Excluded from wilderness are most of the marine waters

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The Committee adopted the Administration recommendation that some water areas should be specified for non-motorized water recreation. S. Rep. No. 413, 96th Cong., 1st Sess. 217 (1979) (emphasis added).

The original Glacier Bay wilderness proposal, which served as the basis for the Congressional action, verifies this goal. Submitted to Congress in August, 1972, it emphasized that the identified water areas should be included because of their "unique saltwater wilderness opportunities." U.S. Department of the Interior, Wilderness Recommendation - Glacier Bay National Monument 11, 18, 19 (August, 1972) (Wilderness Recommendation). This proposal recommended that Adams Inlet, the Hugh Miller/Charpentier Inlets complex (including Scidmore Bay), and part of Dundas Bay be designated as wilderness. Id. at 18. Congress modified this proposal by adding Rendu Inlet, and the waters around the Beardslee Islands.2/

The Wilderness Act's prohibition of commercial enterprises is applied to the Glacier Bay Wilderness through section 707 of ANILCA, which provides that, "[e]xcept as otherwise expressly provided for in this Act, wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act" Since ANILCA establishes no exception to the Wilderness Act's subsection 4(c) prohibition

of "commercial enterprises," the specified water areas of Glacier Bay are closed to commercial fishing, which is clearly a commercial enterprise.3/

The Congressional intent to prohibit commercial fishing in Glacier Bay's wilderness waters is supported further by the 1972 Wilderness Recommendation. As indicated in the ANILCA legislative history, subsection 701(3) merely codified, with some additions, the Interior Glacier Bay Wilderness Recommendation. S. Rep. No. 413, supra, at 217. Reference to the Recommendation demonstrates that special consideration was given to commercial fishing in the monument:

The use of ships, powerboats, and airplanes, and commercial fishing on waters of most of the monument are established by custom and are to continue. Powered vessels are required for safe and reasonable transportation on the major waterways. Therefore, these waters cannot be designated as wilderness, except where specific exclusions are made. Wilderness Recommendation, supra n. 1, at 17 (emphasis added).

After describing the proposed wilderness water areas and noting their "unique saltwater wilderness opportunities," the Recommendation explained, "[m]ost of the water is not proposed because of the existing use of motor-powered vessels and commercial fishing activities." Id. at 18.

Special consideration was therefore given to commercial fishing operations within the monument. Only after reviewing carefully the areas in which such activity occurred did the Administration recommend that certain zones be designated as wilderness. Those recommendations were made with the intent that commercial fishing be prohibited. Thus, by relying upon and assimilating the Interior Wilderness Recommendation, Congress adopted a designation which was designed to exclude commercial fishing from the enumerated wilderness water areas but allow it to occur in non-wilderness zones. Nothing in ANILCA mandates that non-wilderness water areas be closed to commercial fishing. Other commercial activities important to Glacier Bay wilderness purposes are not affected by this ban.4/

The prohibition of commercial fishing in Glacier Bay is consistent with subsection 1110(a) of ANILCA. 16 U.S.C. § 3170(a). That provision indicates that,

[T]he Secretary shall permit, on conservation system units. . .the use of snowmachines. . .motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites.

The language of this provision, along with its legislative history, support an interpretation that it is only the "activity" or end use (e.g., subsistence, hunting, recreation, commercial enterprise) which must be "traditional" and "permitted" by ANILCA or other law in order to allow utilization of the identified access modes. See, e.g., S. Rep. No. 413, supra, at 247-248, 299; H. Rep. No. 97, Part I, 96th Cong., 1st Sess. 238-239, 305 (1979). In other words, subsection 1110(a) should be construed to mean that the absence of an historical pattern of snowmobile use in an area for recreational pursuits is not a basis for closure to snowmobile travel, instead it must be shown that the activity, e.g., recreation, is not "traditional" or is not "permitted."

In the case of Glacier Bay, it is not necessary to determine if commercial fishing is a "traditional activity." As concluded above, commercial fishing is an activity which is precluded under subsection 4(c) of the Wilderness Act. 16 U.S.C. § 1133(c). For this reason, it is not an activity "permitted" by law and is not covered by subsection 1110(a).

Individuals who are engaged in activities allowed under the Wilderness Act, (e.g., recreation, education, science, etc., 16 U.S.C. § 1133(b)), ANILCA, or other law, however, may utilize the subsection 1110(a) modes of transportation, subject to reasonable regulations. 16 U.S.C. § 3170(a). The use of those methods of access for "traditional" and "permitted" activities may be prohibited only if, "after notice and hearing in the vicinity of the affected unit or area," the Secretary finds that "such use would be detrimental to the resource values of the unit or area."

The proposal to prohibit motorboats in the Glacier Bay wilderness water areas (except Dundas Bay and a portion of the Beardsleees) is consistent with the legislative intent for subsection 701(3). See S. Rep. No. 413, supra at 217. In accordance with subsection 1110(a), NPS has made a preliminary determination that motorboat use of these areas would be detrimental to their wilderness values and to park resources. See S. Rep. No. 413, supra, at 217. A final determination on that issue will be made after notice and hearing.

In connection with this issue, it should be noted that the Wilderness Act prohibition on "commercial enterprises" should not be read to preclude traditional commercial activities in other Alaskan wilderness areas. Recreation is among the statutory purposes of wilderness areas. As the legislative history of ANILCA recognizes, guides, outfitters and similar commercial services can be essential to the recreational utilization of Alaskan public interest lands. See, e.g., S. Rep. No. 413, supra, at 171, 308; H.R. Rep. 1045, 95th Cong., 2d Sess. 179 (1978). Moreover, reference to the legislative history of specific park units indicates that recreational activities generally reliant upon hired guides or outfitters are among the Congressionally-authorized uses of areas which have also been designated as wilderness. See, e.g., Denali National Park, S. Rep. No. 413, supra, at 167 (staging for expeditions); Lake Clark, id. at 153 (climbing); Glacier Bay, id. at 164 (white water); Noatak, id. at 156 (hunting and fishing); Wrangell-St. Elias, 16 U.S.C. § 410hh(g) (mountaineering, climbing). Congress also indicated that trapping, subsistence as well as non-subsistence, is considered a permissible wilderness activity. See id. at 308.

When these legislative references are considered in conjunction with the Wilderness Act's exemption for commercial services which are "proper" for realizing wilderness purposes, it is clear that the overall objectives of ANILCA and the Wilderness Act will be served only if the prohibition on "commercial enterprises" is not extended to traditional Alaska activities.


J. Roy Spradley, Jr.

FOOTNOTES

1/ Although Map GLBA-90,004 indicates that Dick's Arm is a wilderness water zone, NPS has determined that this is a map error and that the indicated designation was not intended by Congress.

2/ The Glacier Bay wilderness water zones can be compared to other marine wilderness areas. In Everglades National Park, for example, commercial fishing is authorized within wilderness water areas. In these areas, however, only the submerged lands are designated as wilderness. The supervening water column was excluded from the designation purposely. As the Interior wilderness recommendation noted:

The parks submerged marine lands contain one of the richest ecosystems known to man. The bottoms are essential to an immense web of animal- and plant-life. . . . Commercial fishing also would continue as before over those portions of the submerged marine-land wilderness. U.S. Department of the Interior, Wilderness Recommendation - Everglades National Park 12 (August, 1974).

Unlike Everglades, the water column in the identified Glacier Bay areas was not excluded from the designated wilderness. Obviously, commercial fishing activity cannot occur in Glacier Bay, as it can in Everglades, without impacting the protected components of the designated wilderness.

3/ Special consideration is provided to commercial fishing in section 205 of ANILCA. 16 U.S.C. § 410hh-4. There it is declared that the Secretary of the Interior "may take no action to restrict unreasonably the exercise of valid fishing rights or privileges" in certain areas, including "the Dry Bay area of Glacier Bay National Preserve." If Congress had intended to allow commercial fishing to occur in the wilderness water areas of the Park, it would have undoubtedly done so in section 205. See S. Rep. No. 413, supra n. 1, at 172. The Malspina Glacier Forelands in Wrangell-St. Elias, for example, contains a wilderness land area which serves as a base for support facilities for commercial fishing operations. Under section 205 these "commercial enterprises" will be allowed to continue. Moreover, section 1314 of ANILCA cannot be relied

upon to exempt commercial fishing. 16 U.S.C. § 3202. Although it allows for the taking of fish on the "public lands," it provides that such activity is subject to applicable State and Federal law. Thus, the Wilderness Act prohibitions must be applied.

4/ Early versions of the precursor to ANILCA - H.R. 39 - Included a special exemption for commercial fishing within wilderness areas. See H.R. 39, 96th Cong., 1st Sess. § 612(d) (1979) (House); H.R. 39, 95th Cong., 2d Sess. § 607(j) (1975) (House). Under these proposed sections, commercial fishing would have been permitted in all areas designated under the Act as wilderness, except within national parks. This provision, contained in the House version of H.R. 39, was ultimately rejected in favor of the Senate approach, which included a general administration section in Title VII - section 707 - and listed specific exemptions in section 1315. 16 U.S.C. § 3203. The section 1315 exemptions adopted some of those listed in the House version (i.e., aquaculture, existing cabins, new cabins), added some not found in the House bill (i.e., timber contracts, beach log salvage), and deleted fishery research, commercial fisheries, and several other sections. See H.R. 39, 96th Cong., 1st Sess., § 1315 (1979) (Senate). Thus, Congress chose not to enact a special section to exempt commercial fishing from Wilderness Act management constraints. It should be noted, however, that even if this provision had been included in the Act, it would not have allowed commercial fishing in national park wilderness areas such as Glacier Bay.

Docket
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